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No. 243.

IN THE

Supreme Court

OF THE

UNITED STATES

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Plaintiff in Error,
vs.
EDGAR C. WILLIAMS,
Defendant in Error.

In error to the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BRIEF OF DEFENDANT IN ERROR.

Imprint: Carson-Harper, Denver

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BRIEF OF DEFENDANT IN ERROR.

Counsel filing this brief have a similar case, No. 2353, pending in the United States Circuit Court of Appeals for the Eighth Judicial District, which has been postponed by that court until the above entitled case shall be decided in this court. We have obtained the consent of counsel for defendant in error in this cause to submit this

brief in support of the position of the defendant in error and therefore respectfully submit the following in support of the decision of the court below.

We understand the question certified to this court by the Circuit Court of Appeals of the Eighth Judicial District and upon which the opinion of this court is desired, is as follows:

> "Where the owner of cattle has the option to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company and to travel to the market town on a passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement or restraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage, valid?"

We shall confine ourselves, however, to a discussion of the rights of the shipper or care-taker of cattle traveling on a drover's pass with the cattle, to recover compensation for injuries suffered by him while in charge of such cattle.

ARGUMENT.

We contend that the owner or care-taker of cattle accompanying the same under a limited liability live

stock contract is a passenger for hire if the duty of attending to said stock was placed upon the shipper. We further contend that if the purpose of the person accompanying said stock is to feed, water, load and unload the same, then such person is a passenger for hire and the freight paid for transporting the cattle and his care of them, constitute the consideration for transporting himself as well. If from the evidence it appears that the party injured did accompany said stock for the purposes aforesaid, then he was a passenger for hire, and the railroad company cannot stipulate against liability to him resulting from the negligence of itself or its agents.

The leading case upon this question is that of the New York Central Railroad Company vs. Lockwood, 17 Wallace 357, and able counsel for the railroads have for several years been attempting to secure a reversal of that case; but, as we shall show further on, in vain.

A careful reading of the Lockwood case will show that the contract or release relied on in that case provided that in consideration of the transportation of the cattle "at less than tariff rates," the owner should assume certain risks of injuries to the animals and also

> "That the PERSONS RIDING FREE TO TAKE CHARGE OF THE STOCK do so at their own risk of personal injuries from whatever cause," etc.

Mr. Justice Bradley, who wrote the opinion, which was unanimous, in stating the case says:

> "The plaintiff in this case was a drover, injured whilst traveling on a stock train of the defendants, proceeding from Buffalo to Albany, and the suit was brought to recover damages for the injury. He had cattle in the

train, and had been required at Buffalo to sign an agreement to attend to the loading, transporting and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself, OR WHOEVER WENT WITH THE CATTLE. * * * It may be assumed, *in limine*, that the case was one of carriage for hire, for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question, is, therefore, distinctly raised, whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

N. Y. C. R. Co. vs. Lockwood, 17 Wallace, 357.

The court held they could not.

We submit that there is at law no essential or material distinction to be drawn between the Lockwood case and the case at bar.

In the Lockwood case, 17 Wall, 357, the court reviews all the authorities, and holds:

1st. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

2nd. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or of his servants.

3rd. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

4th. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

In American Express Co. vs. Ogles, from the Supreme Court of Civil Appeals, Texas, a comparatively late case, 1904, reported in 81 S. W., 1023, it was held that:

> "One accompanying stock as an attendant with the consent of the agent of the express company which was transporting the stock, and of the conductor of the train, was a passenger and entitled to protection as such, although his name did not appear on the written contract as an attendant who was to accompany the stock."

The doctrine of these cases is that a caretaker being necessary, the consideration for carrying such an one is the freight paid or to be paid for the carriage of the stock, and hence when it appears that he is traveling for such purpose, though nominally a free passenger, he is in law a passenger for hire and protected as such. As bearing hereon, see following stock drover cases:

Carroll vs. Mo. P. R. R. Co., 88 Mo., 239.
Ohio & Miss. R. Co. vs. Selby, 47 Ind., 471.
Louisville, etc., R. R. vs. Bell, 38 S. W., 3, from Court of Appeals, Texas.

In Louisville, N. A. & C. Ry. Co. vs. Taylor, from the Supreme Court of Indiana, 25 N. E., 869, it is held:

> "In a contract by a railroad company for the transportation of cattle, a stipulation is void, by which in consideration of a free pass, THE PERSON IN CHARGE OF THE CATTLE releases the company from liability

for any injury sustained by him, and the responsibility for negligence, and the presumption thereof from a collision, ARE THE SAME IN SUCH CASE AS IN CASE OF ANY INJURY TO PASSENGER WHO PAYS FULL FARE."

We call the court's attention to the case of Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U. S., p. 397, to the effect that stipulations relieving the carrier from the exercise of care or diligence are not lawful. Mr. Justice Gray says, at p. 441:

> "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to haggle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper that the carrier presents, and in most cases he has no alternative but to do this, or to abandon his business.
>
> "Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld, such as those exempting the carrier from responsibility from losses happening from accident, etc., etc. * * * but the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."

And Justice Gray says:

> "That an analysis of the opinion in Railroad Co. vs. Lockwood shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt

from liability for losses caused by the negligence of himself or of his servants, is unreasonable and contrary to public policy, and consequently void."

We are aware that there are decisions of State courts contrary to this doctrine and holding that a common carrier may stipulate for exemption from all liability, even for its own negligence, but Mr. Justice Gray says (at page 443):

> "It is well settled that the courts of the United States are not bound by the decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law, of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State."

In the Philadelphia and Reading R. R. Co. vs. Derby, 14 Howard, U. S., p. 468, it was held:

> "One who, being lawfully on the defendant's railroad, was injured by the gross negligence of one of their own servants, is entitled to an action for his damages, though he was a stockholder of the corporation, was riding by invitation of the president, paying no fare, and not in the usual passenger cars."

Undoubtedly the plaintiff at bar was lawfully on the train, and if he was injured by the negligence of the defendant, then, under the authority of this case, he could recover.

The Cleveland, P. & A. R. Co. vs. Curran, 19 Ohio St., 1, is a State case, and we cite it, adopting the reason-

ing of the case. Curran made a contract with the company, in duplicate, each party taking one. Immediately after the contract the railroad agent produced a blank drover's pass and inquired of Curran whose name should be inserted. Curran gave his name, which was inserted, and Curran proceeded with the stock. The usual stipulation was on the pass, exempting the company for injury even for its own negligence. He was injured, and the court said (page 11):

> "The controversy arising on the record in this case is embraced in two general questions.
>
> "The first we will consider is, whether Curran, the plaintiff below, was, at the time he received the injury complained of, a gratuitous passenger.
>
> "We think he was not. The ticket called a 'drover's pass' entitled him to ride from Cleveland to Erie with his stock, and to return on a passenger train. A single consideration was paid to the company for this privilege and for the transportation of his stock, and the one service can no more be said to have been gratuitous than the other. It is true, the person using the ticket is referred to in the contract as 'riding free;' and in the endorsement on the ticket it is called a 'free ticket;' but these expressions can, in part only, mean that the holder was to be subjected to no additional charge and that he was to pass free of the usual fare exacted of passengers. The writing 'C' on the ticket to be delivered at the same time and together, constitute one contract. The next question is, whether the stipulation in the contract, exempting the company from all liability for negligence, constitutes a defense to the action."

The court holds it to be no defense. We will not quote further from his argument, but we call attention

to the case because of the cogency of the reasoning. He maintains that recovery is allowed for breach of this duty even when no privity of contract exists between the injured passenger and the carrier.

In Delaware, L. & W. R. Co. vs. Ashley, 67 Fed., 209, one J., a shipper of poultry, contracted for a shipment of a carload; the bill of lading and the way bill stipulating that a man in charge should pass free. The company received the car, with the way bill, and passed the plaintiff who was in charge of the poultry, free, but required him to sign a release of any claim for damages.

Plaintiff was NOT THE OWNER OF, NOR INTERESTED IN the poultry. He was injured by the negligence of defendant.

Held that, the transportation of plaintiff having been part of the consideration of the contract, plaintiff was a passenger for hire, and the release was without consideration and invalid.

To the same effect is the decision of the Supreme Court of Michigan; and it seems even where the contract prohibits any names except "bona fide employees" accompanying the stock to be entered on the way bill, any person actually in charge of the stock is a bona fide employee even though there is no agreement to pay him and he was never employed before. Weaver vs. Ann Arbor R. Co., 102 N. W., 1039.

The case of Rowdin vs. Pennsylvania R. Co., 57 Atlantic, pp. 1125-1126, from the Supreme Court of Pennsylvania, a late case (1904), is very similar to the one under consideration. The injured party was there because he was the caretaker of the shipper's horses. He had signed a release on the back of the contract for shipment, in which he assumed all risks of accident, etc., re-

lieving the company. The lower court directed a verdict for defendant. The Supreme Court of Pennsylvania, in reversing the judgment and awarding a *venire de novo*, says (pp. 1126-27):

> "In Pennsylvania R. R. Co. vs. Price, 96 Pa., 256, a passenger is defined to be 'one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as payment of fare, or that which is accepted as an equivalent therefor.' The plaintiff, when injured, was being carried by the defendant company for a consideration under a contract which made him a passenger, and was not 'riding' upon what was equivalent to a free pass, as suggested by the court below."
>
> The learned judge also says:
>
> "He (plaintiff) had paid no fare, and was not, in the ordinary sense of the word, a passenger upon the road of the Pennsylvania R. R. Company. The contract and the release show that the consideration for the transportation of the plaintiff was included in the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract.
>
> "For this consideration the plaintiff was to be carried from ———— to ————. By the terms of the contract the 'shipper is at his own risk and expense to load and take care of, and to feed and water, said stock while being transported.' It therefore became necessary for the shipper to have some person accompany the horses, and this person was required to be on the train carrying his stock. Recognizing the necessity of some person being in charge of the horses and of his having to travel on the same freight train, and desiring to relieve itself from liability for any injuries sustained by him, the defendant company in-

serted in the contract for transportation the stipulation 'that in consideration of the premises, and of the carriage of a person or persons in charge of said stock upon a freight train of said carriers, without charge other than the sum paid or to be paid for the transportation of the live stock,' the shipper would indemnify the carrier against all claims for injuries sustained by the person in charge of the stock. The language of Read, Judge, in Pennsylvania R. R. Co. vs. Henderson, 51 Pa., 315, an action by a person injured while in charge of stock and riding on a 'free ticket,' is pertinent and applicable to the case in hand. He says (note this): 'As it is absolutely necessary in carrying stock, that the persons who have charge of them should be carried by the company, the price paid for the freight includes the cost of transporting the drover, who is not, therefore, a GRATUITOUS, but a paying passenger; and the word FREE is therefore only true so far as that the conductor is not entitled to charge him separately for his passage.' "

"The same principle is announced in Hanover, etc., R. Co. vs. Anthony, 3 Walker's Reports, 210, and it is IMMATERIAL that the consideration for the PLAINTIFF'S TRANSPORTATION is paid by his employer. The rights of a passenger as against the carrier are NOT AFFECTED by reason of the fact that HIS FARE IS PAID BY ANOTHER than the passenger. Marshall vs. The New Castle & Birmingham R. R. Co., 11 C. B., 655. "Aside from the effect of the release upon the contract of carriage of the plaintiff, to be noticed hereafter, he was therefore a passenger while traveling on defendant's road at the time he received his injuries, and was entitled to the rights and protection of a passenger as against the carrier company," etc., etc.

Feldschneider vs. Chicago, M. & St. P. Ry., 99 Northwestern Rep., 1034, is a stock drover's case and precisely in point to the case at bar.

In the Feldschneider case the plaintiff recovered a large judgment and the defendant appealed, and among other things, set up such a contract or similar to the one in our case as a bar to the suit.

Justice Winslow, in deciding the case, says:

> "Another contention is made which requires attention. The contract under which the plaintiff shipped his stock provided that he might accompany his stock upon the train, but that the defendant should in no event be liable for any personal injury to him upon defendant's cars or road in an amount exceeding $500. The trial court charged the jury, in effect, that this clause was ineffective, and not to be considered by the jury, and this ruling is attacked as erroneous. The plaintiff, though nominally traveling without payment of fare, was in fact a passenger for hire, the agreement for his carriage being a part of the mutual agreement for the carriage of his stock for hire. N. Y. Cent. R. R. vs. Lockwood, 17 Wall., 357; Davis vs. C. M. & St. P. Ry. Co., 93 Wis., 470. Being a passenger for hire, a stipulation exempting entirely the company from liability for injuries caused by the negligence of its servants is void, as against public policy. Davis vs. Ry. Co., *supra*. A stipulation limiting the liability of a carrier for loss of personal property shipped to an arbitrary sum, not fixed with reference to the agreed or maximum value of the property, is void. Ulman vs. Ry. Co., 112 Wis., 150. A FORTIORI, a stipulation limiting the liability for injuries to a passenger for hire to an arbi-

trary sum must also be void. The question WOULD NOT SEEM TO BE OPEN TO SERIOUS DISCUSSION."

An early case which strongly supports our view of the law is that of Flinn vs. Phil. Wil. & Balt. R. Co., 1 Houston (Del.), 469. The lower court in its instructions to the jury stated the law as follows:

> "It appears that he was a drover, and that as such was in the through freight train for the purpose of taking care of his stock, which the defendants had received on board for transportation in that train. It also appears that it was the established practice and usage of the company to grant to the owners of live stock, transported over their road, what is termed a drover's ticket, for the purpose of taking care of his stock and upon his releasing the company from any risk on account of it, and paying the rate of freight charged under any circumstances, which ticket authorized such owner to travel or pass in that train without any further fare or compensation than what was included in the freight charged and paid for the stock; and it also appears that the rate of freight charged by the company on live stock was 25 per cent higher when neither the owner nor any one on his behalf passed in the train for the purpose of taking care of the stock. It was under such circumstances, and in accordance with this practice and usage of the company, as is alleged in behalf of the plaintiff, that he was traveling on this occasion, and at the time when the collision happened and the injury complained of was sustained. * * * But the law in its beneficence will not allow any trifling with the lives or personal safety of human beings, and therefore exacts great care,

diligence and skill from those to whose charge as common carriers they are committed; common carriers of passengers are responsible for any negligence resulting in injury to them, and are required in the preparation, conduct and management of their means of conveyance, to exercise every degree of care, diligence, and skill, which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract, to carry safely, as far as human care and foresight will reasonably admit. A railroad company, using as it does the powerful and dangerous agency of steam, is bound to provide skillful and careful servants, competent in every respect for the posts they are appointed to fill in their service; and is responsible not only for their possession of such care and skill, but also for the continued application of these qualities at all times. PIERCE ON AMERICAN RAILROAD LAW, 469, 470, 471. * * * But we have already informed you, that if you are satisfied, from the evidence in the cause that it was the practice of the company to receive and carry the owners of live stock with their stock on such trains, upon their paying the freight charged under such circumstances, and that the plaintiff had paid his freight and was in the train in conformity with that usage, then he was there rightfully and lawfully, and the defendants and their servants were bound to exercise the same degree of care and diligence in conveying him over their road, in the train in question, as we have before described as incumbent by law on common carriers of passengers for hire generally, and that, so far as this duty was concerned, they stood in a no less responsible relation to him. For in our opinion it was inconsistent with the relation in which they stood to him, or would have stood to any

similar passenger under the like circumstances, and utterly at variance with the duty which the law on the ground of public policy, and as the conservator of the lives and the personal safety, as well as the property of individuals, imposes upon that, as well as upon other classes of common carriers of persons, to allow of such an exemption or limitation of their responsibility for the personal safety of their passengers against injuries resulting from their own negligence, or the want of due care and diligence in carrying them." * * *

And these instructions were affirmed on appeal.

The case of Penn. R. Co. vs. Greso, 79 Ill. App., 129, is another case directly in point.

Greso was in charge of a lot of cattle being shipped by one Albrecht, and both of them signed the following contract:

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract of which live stock he is in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers, or any of its or their employes, or otherwise.

"Signed, Louis Greso, Karler Albrecht."

In deciding this case the Court of Appeals the second time, 102 Ill. Appeals, 252, the court cited the case of I. C. R. vs. Anderson, 184 Ill., 294, in which the Supreme Court said:

> "So far as the contract exempted the company from liability for any injury to the appellee, except such injury as might be the result of gross carelessness on the part of the company, the contract was void. A person who travels with the consent of a railroad company in a freight train in charge of goods or stock carried by the company for hire, is a PASSENGER, and a railroad company cannot exempt itself from the exercise of care and diligence in conveying its passengers, and can not by contract limit its liability for injuries to passengers for gross negligence alone."

In the case of The Illinois Central Railroad Company vs. Anderson, 184 Illinois, 294; S. C. 56 N. E., 331, the court fully examines the validity of such contracts and holds that they are not valid. In conclusion the court says:

> "So far as the contract exempted the company from liability for any injury to the appellee, except such injury as might be the result of gross carelessness on the part of the company, the contract was void. A person who travels with the consent of a railroad company on a freight train in charge of stock or goods carried by the company for him is a passenger, and a railway company cannot exempt itself from the exercise of care and diligence in conveying its passengers, and cannot, by contract, limit its liability for injuries to passengers to gross negligence alone. The company is responsible for any degree of neg-

ligence which is sufficient to cause the injury, whether the negligence be called gross or ordinary." Railroad Co. vs. Beebee, 174 Ill., 13; 50 N. E., 1019; 43 L. R. A., 210.

A very recent case and one that is very fully considered is that of Sprigg's Adm'r vs. Rutland Railroad Company found in 60 Atlantic, 143. In discussing a contract similar to the one before the court, the court uses the following very clear and expressive language:

"As to the nature of the contract, we think the caretaker's contract is supplemental to the shipper's contract, and substantially a part of the same transaction, though executed afterwards, and based upon the same consideration, as is shown by its language, which is that, 'in consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the shipper's contract, without charge other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock he is in charge, the undersigned does hereby voluntarily assume,' etc. Substantially the same language is used in the shipper's contract, where, 'in consideration of the premises, and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid or to be paid for the transportation of the live stock in his or their charge,' the shipper agrees to indemnify the carriers against liability for their negligent injury to the caretaker. This, taken with the fact that the shipper was to feed and care for the cattle while in transit, which necessitated the carriage of a man for that purpose on the same train, and with the further fact that the

> contract nowhere refers to the caretaker's transportation as a free passage, shows that the parties understood in the time of it what their language fairly imports—that the carriage of the man was a part of the contract for the carriage of the cattle, and that the 'sum paid or to be paid' for carrying the cattle was a consideration for carrying the man as well, and, having treated it so then, they are bound by it now."

We deem it important in this connection to call the attention of the court to the cases cited and relied upon by plaintiff in error and by the railroad companies in general in suits of this character and to distinguish them from the principles underlying the Lockwood case and the cases following the ruling in that case.

Cau vs. Texas Pacific R. R., 194 U. S., 427, was a case in which the railroad company sought to exempt its liability for loss by fire in shipping cotton. The court held it could not do so, but cited with approval the Lockwood case and said:

> "There can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. New York C. R. Co. vs. Lockwood, 17 Wall., 357; Bank of Kentucky vs. Adams, 93 U. S., 174."

In the case of the Northern Pacific R. Co. vs. Adams, 192 U. S., 440, Adams rode on a pass as an attorney for several railroad companies, though not of the defendant. In this case there was no consideration moving to the defendant company.

In Grand Trunk R. R. Co. vs. Stevens, 95 U. S., 655, the plaintiff rode on a free pass precisely like the

one in the Adams case, but he was on business for the company. Justice Bradley says:

> "The transportation of the plaintiff in the defendants' cars, though not paid for by him in money, was not a matter of charity, nor of gratuity in any sense. * * * The pass was a mere ticket to show the conductors of the trains, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of Lockwood's."

Mr. Justice Brewer in deciding the Adams case said:

> "He (Adams) was not a passenger for hire, such as was held to be the condition of the parties recovering in the LOCKWOOD and STEVENS cases."

Queen of the Pacific, 180 U. S., 278, was a case of damage to goods shipped and the bill of lading contained a stipulation that all claims for damages must be presented within thirty days. The shippers knew of the loss three weeks before the time expired and the court held that the provision was reasonable. In this case the court, speaking by Mr. Justice Brown, cites the Lockwood case with approval.

Chicago & N. W. Ry. Co. vs. O'Brien is a case of an express messenger, who, the court says, occupies a position analagous to one of the railroad companies' employes, and this position is so apparent as to need no comment.

Baltimore & Ohio S. W. Ry. Co. vs. Voight, 176 U. S., 498, was another express messenger case, and Mr.

Justice Shiras delivered the opinion of the court and said:

> "This court held that a drover traveling on a pass, for the purpose of taking care of stock on the train is a passenger for hire, and that it is not lawful for a common carrier of such passengers to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. Grand Trunk R. Co. vs. Stevens, 95 U. S., 655; Liverpool & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397.
>
> "THE PRINCIPLES DECLARED IN THOSE CASES ARE SALUTARY, AND WE HAVE NO DISPOSITION TO DEPART FROM THEM."

Boering vs. Chesepeake Beach Ry. Co., 193 U. S., 442, was another case of a free passenger who paid nothing for the transportation and rendered the railroad company no service. Justice Brewer in rendering the opinion followed the Adams case, which, as we have already shown, recognizes and distinguished the Lockwood case from the cases of a free pass.

Rogers vs. Kennebec Steamboat Co., 29 Atl., 1069, was the case of a passenger riding on a free pass on a steamboat.

Justice Whitehouse, in rendering the opinion in this case, said:

> "In the great case of Railroad Co. vs. Lockwood, 17 Wall., 357, the Federal Court reached the conclusion that a condition on a 'drover's pass' requiring the person using it to travel at his own risk, was not a valid and ef-

fectual one, and could not exonerate the carrier from liability for negligence. It is important to notice, however, that this decision is put on the ground that a 'drover's pass' was issued as a part of the contract for the carriage of the cattle, and could not be deemed a gratuitous one. At the close of the elaborate opinion in the case is a distinct finding that 'A DROVER TRAVELING ON SUCH A PASS AS WAS GIVEN IN THIS CASE, FOR THE PURPOSE OF TAKING CARE OF HIS STOCK ON THE TRAIN, IS A PASSENGER FOR HIRE." The same doctrine was applied in the later case of Railway Co. vs. Stevens, 95 U. S., 655. There the servant of an inventor obtained a pass to see an officer of the road in regard to the use of a new coupling. * * *

"THESE DECISIONS OF THE FEDERAL COURT, THEREFORE, HAVE NO APPLICATION TO THE PRECISE QUESTION HERE RAISED."

Quinby vs. Boston & Maine R. Co., 150 Mass., 365, is another free pass case; so is Griswold vs. New York, etc., R. R. Co., 53 Conn., 371. Both these cite the Lockwood case and distinguish it from the cases before the court. In the Griswold case the court said:

"We are not disposed to controvert the soundness of these propositions (those stated by Justice Bradley in the Lockwood case), as applicable to passengers for hire. * * * IT SEEMS TO US THE TWO CASES CANNOT BE IDENTICAL IN THE EYE OF THE LAW OR OF PUBLIC POLICY, BUT THAT THERE IS AMPLE GROUND FOR A DISTINCTION."

Payne vs. Terre Haute & I. R. Co., 157 Ind. 616; S. C. 62 N. E. 472, is another 'free pass' case and the court clearly distinguished that case from the case at bar in the following language:

> "In the Selby, Nickless and Faylor cases, *supra,* the plaintiffs were traveling on passes which purported to release the company from damages through their negligence, and the stipulations were held void. But the passes were 'stock drovers'' passes, issued in connection with bills of lading of the shipment of live stock, which the plaintiffs were to accompany and care for. The usual rates were paid and the court properly decided that the transaction was an entirety, that plaintiffs had paid for the transportation of their persons as well as their stock; that the companies stood in the relation of common carriers for hire to plaintiffs as part of the general public; and that therefore the rule which forbade the companies to abandon a duty owing to the general public rendered the waiver void." * * *
>
> Again: "The reasons on which is based the rule that public carriers will not be permitted to evade a public duty wholly fail, for railroad companies are under no obligation to transport the GENERAL PUBLIC GRATUITOUSLY."

The case of Muldoon vs. Seattle City Ry. Co., 7 Washington, 528, is a case of a passenger on a street railway riding on a free pass.

In this case the court said:

> "It is a general rule that carriers of passengers for hire cannot contract against their liability for damages for injuries to their passengers, and this rule has been frequently held

to be none the less operative when the evidence of the passenger's right to travel was put in the form of a free pass, if in fact there was a consideration for its issuance. Railroad Co. vs. Lockwood, and Railway Co. vs. Stevens."

* * *

Again: "There can be no question as to the propriety of that rule of law which prohibits a common carrier from forcing upon any person who deals with it in its public capacity a condition against liability arising from its own negligence. The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it, to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carrier owes to the public and to the individual is to perform the service safely, without any limiting conditions; and, therefore, such conditions, when the imposition is attempted, VIOLATE AN IMPLIED DUTY, AND ARE HELD JUSTLY VOID."

The Cyclopedia of Law and Procedure, Vol. 6, pp. 544 and 545, states the law as follows:

"Persons are, however, frequently transported on so-called passes who are not in fact gratuitous passengers, because the right to ride without payment of special compensation therefor is given in part consideration of payment which is principally for other services. Thus one who travels on a drover's pass, which is issued in connection with the transportation of live stock for hire, is not a free passenger, but a passenger for compensation. And those who are carried on freight trains to look

after live stock which is being transported, and as an incident to such transportation, are entitled to protection as passengers."

Under this paragraph are cited decisions from Del., Ill., Ind., Kentucky, Mo., Ohio, Tex., Ver., Wis., and the United States. There is not a single citation of any authority to the contrary. NOT ONE.

Counsel for plaintiff in error insists that the transportation of Williams, the defendant in error, was a gratuity and that the transportation was separate and apart from the consideration for the carriage of the cattle. This is an error to which we desire to call the attention of the court. The railroad company as one transaction did three things. That is to say, it received certain money, it received cattle for transportation and it received Williams as the man in charge of those cattle, not as a different transaction, but as one and the same transaction; the contract, as well as the necessities of the case, required that some one should be in charge of the cattle. The exeedingly clever and skillful argument of counsel separates this matter into three transactions. They say that the railroad company has assumed to carry the cattle for hire without any agreement to carry the man in charge thereof, either free or in consideration of money paid as freight for the cattle; that they were under no obligations to carry the man at all, except for pay; and that therefore, when they subsequently agreed to carry him for nothing, it was a separate transaction and hence a gratuity. This argument all falls to the ground if the whole is regarded as one transaction, as the evidence shows it was.

The contract in regard to the transportation is as follows:

> "And in consideration of free transportation for one or more person, designated by the first party, hereby given by said Railroad Company, such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said Railway Company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents or co-partners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.
>
> "It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which results from the nature or propensities of such animals, etc."

We see from this contract that in consideration of the transportation, the owner or person accompanying the stock was to feed and water the same, load and unload and to care for the same, so that the pass was not a "gratuity," but that there was a legal and valid consideration therefor.

But it is claimed there was no consideration in money moving to the railroad company. This is not true, if the contract for the cattle and the contract for the carriage of the man were one and the same transaction, and that they were is evidenced by the fact that the same bill of lading, or live stock contract, of the plaintiff in error contains both stipulations for the carriage of the cattle and the carriage of the man in charge of the cattle. Would the railroad company have carried defendant in error if he had not been in charge of the cattle? If not, was not the freight paid on the cattle the legal consideration for his carriage? It certainly was the real consideration which induced the railroad company to carry the man. Every railroad company which carries a man in charge of cattle, does it to get the business and to secure the freight money. Why then, was it not the legal consideration?

We insist that there is absolutely no difference between this case and the Lockwood case, and that therefore the doctrine announced in the Lockwood case must be affirmed here.

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